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IN THE

Supreme Court of the United States

October Term 1970
No. ~~1512~~ 70-104

EDDIE JAVOR, ALAN H. RICE, and LAWRENCE S. TOROKER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

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EDDIE JAVOR, ALAN H. RICE, and LAWRENCE S. TOROKER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Petitioners pray that a writ of certiorari issue to review judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on October 29, 1970.

Citations to Opinions Below.

The judgment of the Court of Appeals is reported at 435 F.2d 836 after a prior remand by said Court which is reported at 403 F. 2d 507. Said opinions are printed as Appendix A and Appendix B respectively.

Jurisdiction.

The Ninth Circuit Court of Appeals affirmed the convictions of the petitioners on October 29, 1970 (rehearing denied on January 25, 1971). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

All questions raised in this instant petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

Questions Presented.

1. Whether or not the Court below erred when it failed to hold a sanity hearing prior to receiving the confessions of Rice and Toroker into evidence after receiving psychiatric reports which stated that Rice and Toroker were legally insane at time of said confessions.

2. Whether the Court by its actions prevented the jury from receiving all relevant evidence as to the voluntariness of the Rice and Toroker confessions and making a proper determination with regard thereto.

3. Whether the Ninth Circuit Court of Appeals has denied Appellants herein equal protection of the law by its holding that the rule of *Wade v. United States*, 426 F. 2d 64 (9th Cir. 1970) does not apply in the instant case.

4. Whether the holding of this Court in *Bruton v. United States*, 391 U.S. 123 (1968) should apply when the confessing codefendant takes the stand and is available for cross-examination.

Constitutional Provisions.

The constitutional provisions involved are the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Statement.

a. The Rice and Toroker Confessions.

It was the position of the court below on remand and the Ninth Circuit Court of Appeals that there was sufficient evidence for the court to make a finding of voluntariness based upon the record when the original determination was made during the trial to let the jury decide the question of voluntariness. The only thing done by the court on remand was to state that it meant to find the confessions voluntary during the trial but due to a failure to enunciate its position clearly at that time its finding was not spelled out with sufficient certainty.

The petitioners' point here is that it was impossible as a matter of law for the court to make such a finding on the record then before it. This is so because the court was faced with an evidentiary conflict that it could not resolve without further evidence. In *Javor v. United States*, 403 F. 2d 507, 511 (9th Cir., 1968), the dilemma of the court below was set forth in its own words:

> "THE COURT: On the issue of voluntary confession. We have this conflict on it. On the one hand the officers have testified at the time of the arrest and the time these statements were made they appeared to be the same as they are in the courtroom with embellishments.
>
> "The psychiatrists' reports indicate that from information given to them, although they are sane now, or were sane at the time of the examination, the Doctors indicate they were insane at the time

of the arrest and probably at the time of the commission of the offense.

"This is a conflict in the evidence which I think must go to the jury, and it is going to have to be done. We will have to leave this discussion to a proper framing of a proper instruction at the appropriate time. I don't see any other answer to it."

This was the court speaking not the jury but to counsel. How could it possibly determine beyond a reasonable doubt that the confessions were freely and voluntarily given while at the same time making the above statement?

It had before it the report of two psychiatrists (only one of which is before the court, *i.e.*, Dr. Tweed's report on Toroker) which stated that the defendants were *insane* during the commission of these crimes which was practically contemporaneous with the confessions. What then was the court's duty? Surely, if a man is insane his confession cannot be voluntary. The only evidence to the contrary was that of a narcotic agent who was not a trained doctor and did not even know how a person under the influence of LSD would act [Rep. Tr. of Trial 458, see also pp. 501, 512, 514].

It is interesting to note that all of the later testimony was to the effect that a person under the influence of LSD would appear normal to another person:

1. Testimony of Stephen Cole [Rep. Tr. pp. 553-558].

2. Testimony of Mary Lou Rice [Rep. Tr. pp. 606, 610].

3. Testimony of Dr. Tweed [Rep. Tr. pp. 743-744, 793-794, 795-797].

4. Testimony of Dr. Sidney Cohen [Rep. Tr. pp. 832-833].

Both Dr. Tweed [Rep. Tr. pp. 744-745] and Dr. Cohen [Rep. Tr. pp. 855-857] testified that persons under the influence of LSD were susceptible to external suggestion, *e.g.*, confession is good for the soul.

It is a maxim of federal jurisprudence that the court is not a mere observer but actually has a duty to elicit relevant facts and control the proceedings before it. In this case when the confessions were first discussed and the reports of Drs. Von Hagen and Tweed were submitted to the court it was necessary for the court on its own to take certain affirmative actions. If as stated in the doctors' reports, Rice and Toroker were insane at the time the confessions were made, then said confessions could hardly be considered voluntary and the court was obliged to look into the matter without a specific request from counsel and in the absence of such a request.

The Second Circuit Court of Appeals has dealt with a similar situation in *United States v. Silva,* 418 F. 2d 328 (2d Cir., 1969). In that case Silva was arrested on January 4, 1968, and charged with an August 10, 1967 bank robbery in New York City. At his trial there was evidence against him, including a confession from which the jury could have found that he was guilty of violating 18 U.S.C. §2113(a) and (d). On appeal challenged the use of his confession in evidence.

A pretrial hearing to determine the voluntariness of the confession disclosed that when he was arrested Silva told an F.B.I. agent that he would commit suicide

rather than stand trial and several days later, while still in custody, Silva swallowed several items, including half of a razor blade and some bed spring connectors. He was taken to the prison ward of the psychiatric division at Bellevue Hospital where he was treated. Silva had been previously questioned three times by the F.B.I. about the bank robbery for which he was arrested and on each occasion had signed a waiver of his rights and made a statement denying his participation. The last of these three interviews took place on January 10, 1968, while Silva was at Bellevue.

On January 17, 1968, Silva met with the attorney from the Legal Aid Society who represented him. The attorney in addition to discussing Silva's rights with him also discussed the possibility of a confession with Silva. The attorney then spoke to an Assistant United States Attorney about whether a confession would make it possible for Silva to be a cooperative government witness at the trial of his codefendants. Silva's attorney then left him alone with two F.B.I. agents and the prosecutor who spoke with Silva for two hours and drafted a detailed confession which Silva, after executing a waiver, refused to sign.

On the voluntariness hearing Silva denied making the above confession but testified that he had previously undergone psychiatric treatment at various hospitals for mental disorders. Silva testified that he had told the prosecutor about hallucinatory visions, prior use of heroin, and several attempts to commit suicide. The prosecutor testified at the hearing that he knew only that Silva had been hospitalized for a few days after swallowing some articles. The court found that Silva had been advised of his constitutional rights and that his confession was voluntary.

At the trial Silva did not raise the defense of insanity or request a psychiatric examination but at its conclusion both the prosecutor and defense counsel asked the court to consider such a measure prior to sentencing. A motion under 18 U.S.C. 4208(b) for a 90-day examination was made at that time but later withdrawn.

Silva's main contention on appeal was that his confession should not have been found voluntary because there was no investigation of his mental competency to waive his rights and confess. The Second Circuit Court of Appeals agreed with his contention based upon the following reasoning at 418 F. 2d at 330-331:

> "A confession or waiver of rights cannot be termed voluntary if it is made by a person whose mental condition at the time was such that 'the confession most probably was not the product of any meaningful act of volition.' Blackburn v. Alabama, 361 U.S. 199, 211, 80 S. Ct. 274, 282, 4 L. Ed. 2d 242 (1960); see Westbrook v. Arizona, 384 U.S. 150, 86 S. Ct. 1320, 16 L. Ed. 2d 429 (1966); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Once it becomes apparent that the accused's mental condition is a factor that ought to be looked into in relation to the admissibility of his confession, the trial judge must hold a hearing at which relevant evidence may be offered, including the testimony of experts, from which the court will decide whether the accused was at the time he confessed so mentally ill that he was unable, with intelligence, knowledge and understanding, to relinquish or abandon a known right or privilege which was his; or whether 'the confession most probably

was not the product of any meaningful act of volition.' If it is found that neither of these things is so, the confession must be excluded. See Green v. United States, 128 U.S. App. D.C. 408, 389 F. 2d 949, 952 (*en banc* 1967); Gladden v. Unsworth, 396 F. 2d 373, 380-381 (9 Cir. 1968).

"Even though Silva's mental competence was never placed directly in issue, the testimony concerning the circumstances of his confession was such that the trial judge should have ordered a hearing *sua sponte* on the narrow issue of his capacity to make it. See Westbrook v. Arizona, *supra*; Pate v. Robinson, *supra*. He stresses his alleged history of psychiatric disturbances and suicide attempts simply as background to the question of his competence at the time of the confession."

The above described case is not nearly as strong as that before this honorable court because here the court had before it the psychiatric reports stating that both Rice and Toroker were insane and no psychiatric evidence to the contrary. It was at that time the court's duty to conduct an evidentiary hearing into the matter of how voluntariness was effected irrespective of the fact that counsel on both sides were willing to submit the matter. *United States v. Silva, supra.*

b. The Court's Action in Limiting the Introduction of Evidence of the LSD Consumption of Rice and Toroker.

The Court Below by Its Own Actions Prevented a Full and Fair Factual Determination on Whether Rice and Toroker Were Under the Influence of LSD When They Made Their Confessions.

As stated by the Court below, and quoted in the opinion of the Ninth Circuit Court of Appeals, *Javor v. United States, supra,* at 509:

> "I have not read the doctors' reports but it occurs to me in view of the testimony that it is going to become a factual question the extent to which the defendants have been using and were using LSD at the time. * * *"

The Court went on to state in substance that the jury could either believe or disbelieve the defendants on their use of LSD and thus resolve the question of voluntariness.

Even if we assume for the sake of argument only, that the Court below considered the entire record of the trial before making its ruling on voluntariness, the appellants were still deprived of a proper factual hearing because the Court, during the trial of this matter, unjustifiably limited the defendants-appellants in their factual presentation.

At the trial of this case, Rice and Toroker sought to introduce evidence as to their usage of LSD because that was a very crucial issue in the case.

Stephen Bryan Cole, a defense witness, testified that he saw the defendants Rice and Toroker take substantial quantities of LSD during the period in question [Rep. Tr. pp. 553, 557], and that whenever he saw them—which was three or four times a week—they were always under the influence of LSD [Rep. Tr. p. 558].

The very next defense witness was Linda Marie Quante.—As soon as she took the stand, the Court indicated that it would not admit any testimony that was merely cumulative of that given by Mr. Cole, the

preceding witness [Rep. Tr. pp. 577-578]. The very same thing occurred when the next witness, Regina Champlain, testified; only this time the Court actually sustained an objection on the ground that her testimony would be cumulative [Rep. Tr. pp. 595-596].

How, under that circumstance, can it be contended that the appellants received a full factual determination on the issue of voluntariness in the Court below? The simple answer is that it can't and the determination of the Court below was erroneous.

At some point evidence becomes cumulative and a proper objection ought to be sustained but that point had not been reached on the issue of voluntariness and it was the Court itself that precluded the proper factual determination required under the law of our land, *Jackson v. Denno, supra; Javor v. United States, supra.*.

c. Equal Protection of the Laws.

IV.

THIS COURT HAS DENIED APPELLANTS HEREIN EQUAL PROTECTION OF THE LAW BY ITS HOLDING THAT THE RULE OF WADE V. UNITED STATES DOES NOT APPLY IN THE INSTANT CASE.

The Ninth Circuit Court of Appeals has ruled that the appellants herein cannot receive the benefit of its holding in *Wade v. United States,* 426 F. 2d 64 (9th Cir. 1970) that said holding applies to cases on direct appeal even though the instant case is clearly on direct appeal.

The Court's basis for this ruling after conceding that "this appeal was pending at the time" was that "the judgments of conviction were final as to every issue

except that of the voluntariness of the confessions." This statement referred to the prior opinion of this Court in *Javor v. United States,* 403 F. 2d 507 (9th Cir. 1968) where the basis for that conclusion is itself not at all clear. In no sense can the judgments of conviction be deemed "final" when the time for filing a petition for certiorari had not passed.

In the appellants' original opening brief, at page 33, the propriety of the insanity instruction was raised. That issue, like several others raised on the appellants' brief, was not discussed in the Court's opinion except for the following statement of the Court, at 403 F. 2d 508:

> "We have carefully considered appellants' several assignments of error. Just three contentions of appellants merit discussion."

This Court then remanded the case back to the District Court for a hearing on the voluntariness of the Rice and Toroker confessions. After the District Court found them to be voluntary the case was returned to this Court to review that finding and Javor's appeal was resubmitted to the Court, 403 F. 2d at 512.

It is difficult for the petitioners to understand how the Court had concluded the issue of the insanity instruction is no longer on direct appeal. When the Ninth Circuit Court of Appeals rendered its decision and remanded the case to the District Court, was counsel for the appellants obliged to file a Petition For Rehearing in the Circuit or a Petition For Certiorari in the United States Supreme Court in order to protect all issues raised by Rice and Toroker other than the voluntariness of their confessions?

d. Applicability of Bruton.

The Ninth Circuit in its opinion, *Javor v. United States, supra,* pages 511 and 512, stated the problem as follows:

> "The written confessions of both Rice and Toroker identified Javor as the source of the contraband. The trial judge proposed that counsel stipulate before the jury that Rice and Toroker had, at a prior time, admitted committing all of the offenses set forth in the counts of the indictment under which each was charged. Counsel so stipulated, and no reference was made to the source of the narcotics in the government's case-in-chief.
>
> "During the presentation of the defense, Rice and Toroker testified under examination by defense counsel that one 'Nick' and not Javor was the source of the contraband and, further, that Javor was present on critical dates at the residence of Rice and Toroker for legitimate business purposes only.
>
> "On cross-examination the government was permitted, over objection, to confront both Rice and Toroker with certain portions of their written confessions, wherein each had named Javor as the supplier of the narcotics, and had stated that Javor's presence at their residence on the critical dates was in connection with this activity. Both Rice and Toroker eventually admitted that they had made these statements in their written confessions. The court carefully and fully instructed the jury that such evidence was received solely for impeachment and only against Rice and Toroker, and that it was not to be considered against Javor for any purpose."

The petitioners are aware that the Ninth Circuit has recently held that the case of *Bruton v. United States, supra* deals with the right to confrontation and when the confessing codefendant takes the stand and is cross-examined by counsel for the defendant, that defendant is not denied the right to confrontation and *Bruton v. United States, supra* will offer him no solace, *Santoro v. United States,* 402 F. 2d 920 (9th Cir. 1968).

It is respectfully submitted that *Santoro v. United States, supra* is not controlling in the instant case for each of the following reasons:

1. The court distinguished that case from three cases arising in the Seventh Circuit: *United States v. Guajardo-Melendez,* 401 F.2d 35 (7th Cir. 1968); *United States v. Lyon,* 397 F.2d 505 (7th Cir. 1968); *United States v. Gordon,* 253 F.2d 177 (7th Cir. 1968). In two of those cases, the confessing codefendant took the stand and was subject to cross-examination and yet the Circuit Court reversed in each case. The Ninth Circuit in *Santoro* distinguished each of those cases on its facts:

A. In *United States v. Guajardo-Melendez, supra* the Court found the conversation added little to the government's case against the codefendant while it was deadly poison to the defendant, as was not the case in *Santoro.* Is that not, however, the situation in the case at bar? The confessions added nothing to the government's case against Rice and Toroker, in view of the fact that it had been stipulated that they had confessed to the crimes charged [Rep. Tr. p. 514] and counsel offered to stipulate that

Toroker had been impeached in his confession where he stated persons other than those named in Court were involved in the subject crimes [Rep. Tr. pp. 912, 913]. Counsel for Toroker offered to stipulate to any impeachment desired by the government, as long as Javor's name wasn't used [Rep. Tr. pp. 913, 914, 920]. Counsel for Javor made a similar request [Rep. Tr. pp. 928, 929].

B. In *United States v. Lyon, supra,* the confessing codefendant did not testify at the time of trial.

C. In *United States v. Gordon, supra,* the "confessing" codefendant's statements were exculpatory as to himself and poison as to Gordon and their purpose was to prejudice Gordon. Is this not the situation in the instant prosecution?

2. The interpretation of the Ninth Circuit Court of Appeals in *Santoro v. United States, supra* and *Rios Ramirez v. United States,* 403 F.2d 1016, 1017 (9th Cir. 1968) that *Bruton v. United States, supra* is not intended to apply to a situation where the extrajudicially confessing codefendant takes the stand and is subject to cross-examination is not a proper interpretation of *Bruton.*

It should also be noted that *Bruton* at 391 U.S. 126 specifically overruled *Delli Paoli v. United States,* 352 U.S. 232 (1957) which had absolutely nothing to do with confrontation and was based upon the ability of a jury to follow instructions. This ability was effectively repudiated in *Jackson v. Denno, supra* and *People v. Aranda, supra* which appellants here contend is the real basis of *Bruton* and not the right to confrontation

which the various circuits have seized upon, thus effectively and improperly emasculating *Bruton*.

3. Toroker repudiated his confession at the trial as regards the appellant Javor. He did that by testifying that his confession in that regard was untrue and a lie he was forced to acknowledge by Federal Agents [Rep. Tr. pp. 983 *et seq.*]. The same situation applied as to Rice [Rep. Tr. pp. 1111 *et seq*].

In a situation where the confessing codefendant does take the stand but repudiates his confession, the defendant has no effective right of cross-examination, *Townsend v. Henderson*, 405 F.2d 324, 329 (6th Cir. 1968). In that case the codefendant denied making the confession, whereas in this case the codefendants admit signing typed confessions but deny that the words are theirs, *i.e.* they only signed the documents and did not make the confessions. It would seem, therefore, that the cited case is indistinguishable from the case at bar on that basis. See also *West v. Henderson*, 409 F.2d 95, 97 (6th Cir. 1969).

REASONS FOR GRANTING THE WRIT.

1. The Court should grant certiorari to resolve a conflict between the Ninth Circuit in *Javor v. United States*, 435 F. 2d 836 and the Seventh Circuit in *United States v. Silva*, 418 F. 2d 328. This conflict is whether or not it is necessary to hold a sanity hearing prior to a determination on the voluntariness of a confession when there is evidence of insanity.

2. The Court should grant certiorari to resolve a conflict between the Ninth Circuit in *Javor v. United*

States, 435 F. 2d 836 and the Seventh Circuit in *United States v. Guajardo Melendez,* 401 F. 2d 35. This conflict is whether or not *Bruton v. United States, supra,* applies where a confessing codefendant has taken the stand and is subject to cross-examination.

3. The Court should grant certioriari to consider whether it has denied petitioners equal protection of the law by not giving them the benefits of *Wade v. United States, supra.*

4. The Court should grant certiorari to consider whether the petitioners were denied due process of law and a fair trial when the District Court Judge refused to let the jury consider necessary, relevant and material evidence.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

RICHARD G. SHERMAN,
SHERMAN & STURMAN,
Attorneys for Alan Harvey Rice, Lawrence Sanford Toroker and Eddie Javor, Petitioners.

DAVID ROTHMAN,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. Alan Harvey Rice, Lawrence Sanford Toroker, Eddie Javor, Appellants. No. 21172 A & B.

United States Court of Appeals, Ninth Circuit. Oct. 29, 1970.

Rehearing Denied Jan. 25, 1971.

Appeal after remand, 403 F.2d 507, by defendants convicted in the United States District Court for the Central District of California, Jesse W. Curtis, J., of narcotics violations. The Court of Appeals held that fact that two codefendants testified as to their confessions implicating third codefendant in narcotics violations did not require reversal where such testimony was subject to cross-examination by nonconfessing codefendant.

Affirmed.

Richard G. Sherman, Sherman & Sturman, Beverly Hills, Cal., for L. S. Toroker and Eddie Javor.

David M. Rothman, Los Angeles, Cal., for A. Rice.

Joann I. Dunne (argued) and Henry J. Novak (argued), Asst. U. S. Attys., Robert L. Meyer, U. S. Atty., Los Angeles, Cal., for appellee.

Before BROWNING and ELY, Circuit Judges, and VON DER HEYDT, District Judge.*

PER CURIAM:

The three appellants were convicted in 1966 on several counts involving narcotics violations under 21

*Honorable James A. von der Heydt, United States District Judge, District of Alaska, sitting by designation.

U.S.C. §§ 174 & 176a. Their appeal to this court was partially successful, and we remanded for further proceedings on the issue of the voluntariness of confessions given by Rice and Toroker. Javor v. United States, 403 F.2d 507 (9th Cir. 1968). The trial record, which was before us at the time of the first appeal, supported the conclusion that the District Court had misconstrued its function in making the preliminary determination of voluntariness of the confessions. It appeared to us that the trial judge had indicated that he was making only a tentative conclusion before sending the case to the jury for a resolution of the conflicting evidence. We remanded for the purpose of allowing the district judge to make an independent finding of whether the confessions were voluntary beyond a reasonable doubt. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). On remand, the district judge made it clear that his trial ruling had been misinterpreted by this court and that he had indeed been convinced beyond a reasonable doubt that the confessions were voluntary. We have been pointed to nothing in the record that could convince us that the trial judge's finding was "clearly erroneous."

On this second appeal, Javor now presents a question that we declined to answer on the first appeal. The facts surrounding this contention were set out by us as follows:

> "The written confessions of both Rice and Toroker identified Javor as the source of the contraband. The trial judge proposed that counsel stipulate before the jury that Rice and Toroker had, at a prior time, admitted committing all of the offenses set forth in the counts of the indictment, under which each was charged. Counsel so stipu-

lated, and no reference was made to the source of the narcotics in the government's case-in-chief.

"During the presentation of the defense, Rice and Toroker testified under examination by defense counsel that one 'Nick' and not Javor was the source of the contraband and, further, that Javor was present on critical dates at the residence of Rice and Toroker for legitimate business purposes only.

"On cross-examination the government was permitted, over objection, to confront both Rice and Toroker with certain portions of their written confessions, wherein each had named Javor as the supplier of the narcotics, and had stated that Javor's presence at their residence on the critical dates was in connection with this activity. Both Rice and Toroker eventually admitted that they had made these statements in their written confessions. The court carefully and fully instructed the jury that such evidence was received solely for impeachment and only against Rice and Toroker, and that it was not to be considered against Javor for any purpose."

403 F.2d at 511-512. Javor has urged that Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), requires reversal. We did not deal with the question earlier because it was premature until the voluntariness issue had been decided.

Bruton held that a confession given by one defendant and implicating a codefendant may not be admitted into evidence if the confession defendant does not testify. The confession would constitute inadmissible hearsay evidence against the codefendant, who

would thus be denied his constitutional right to confront and cross-examine the witness against him. Since *Bruton* was concerned primarily with preserving the right of cross-examination, our court has held that reversal is not required if a confessing codefendant testifies subject to cross-examination by the nonconfessing defendant. Santoro v. United States, 402 F.2d 920 (9th Cir. 1968), cert. denied, 400 U.S. ...., 91 S.Ct. 58, 27 L.Ed.2d 86 (Oct. 13, 1970).

Appellants Rice and Toroker urge on this appeal that their convictions should be reversed because the trial court refused to instruct the jury in terms of the American Law Institute standards on insanity. We held in Wade v. United States, 426 F.2d 64 (9th Cir. 1970), that the outdated *M'Naghten* standards would no longer be deemed sufficient and that the District Courts of our Circuit should, with certain modifications, apply the A.L.I. proposals. The new rule was held to apply with "limited retroactivity" so as to affect those cases in which the judgments of conviction were not yet final at the date of the Wade opinion. Under the literal language of *Wade*, Rice and Toroker would gain the benefit of that opinion, since this appeal was pending at the time. But the judgments of conviction were final as to every issue except that of the voluntariness of the confessions. We had already reviewed the convictions and had remanded only for limited proceedings in the District Court. In these circumstances, we hold that the issue concerning appropriate insanity instructions was foreclosed to these appellants before the issuance of our *Wade* opinion.

Affirmed.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Eddie Javor, Alan H. Rice and Lawrence S. Toroker, Appellants, v. United States of America, Appellee. Nos. 21172A, 21172B.

United States Court of Appeals, Ninth Circuit. Nov. 14, 1968.

The United States District Court for the Southern District of California, Central Division, Jesse W. Curtis, J., found defendants guilty of various narcotic offenses and they appealed. The Court of Appeals held that record as whole did not establish that trial court discharged its duty to resolve evidentiary conflicts as to whether confessions were given under influence of drug.

Remanded for further proceeding.

Richard G. Sherman, (argued) of Sherman & Sturman, Beverly Hills, Cal., for appellants.

Jo Ann I. Dunne (argued) Asst. U. S. Atty., Wm. M. Byrne, Jr., U. S. Atty., Los Angeles, Cal., for appellee.

Before BROWNING and ELY, Circuit Judges, and* FOLEY, District Judge.

PER CURIAM:

Appellants went to trial before a jury on November 9, 1965, on a thirteen-count indictment. All counts except Count Eight charged violations of Title 21, section 174 of the United States Code. Count Eight alleged

*Honorable ROGER D. FOLEY, District of Nevada, sitting by designation.

a violatio nof Title 21, section 176a of the United States Code.

Appellant Javor was charged on Counts Ten and Eleven only. He was convicted on both counts. Javor was sentenced to serve seven years on Count Ten and seven years on Count Eleven, the sentences to run concurrently.

Appellant Rice was charged in all thirteen counts. However, before the jury was impaneled, Counts Six and Seven, which named only Rice, were dismissed. Rice was found guilty as charged in the remaining eleven counts.

Appellant Toroker was charged in Counts One, Two, Five, Eight, Nine, Ten, Eleven, Twelve, and Thirteen and convicted on all of the said counts.

Both Rice and Toroker were committed for study pursuant to Title 18, section 4208(b) and (c) of the United States Code. After study, each of them was sentenced to serve five years for each count of which they were convicted, all sentences to run concurrently.

We have carefully considered appellants' several assignments of error. Just three contentions of appellants merit discussion.

QUESTION I

Appellants Rice and Toroker contend that the trial court committed prejudicial error in the manner in which it instructed the jury on entrapment. The government concedes that the trial court committed error.

However, we note that Toroker denied the commission of the offenses charged against him in Counts One, Two, Five, Twelve, and Thirteen. Rice denied the commission of the offenses charged against him in Counts

One, Two, Three, Four, Twelve, and Thirteen. Toroker interposed the defense of entrapment and was entitled to an instruction on entrapment as to Counts Eight, Nine, Ten, and Eleven. Rice interposed the defense of entrapment and was enittled to an instruction on entrapment as to Counts Five, Eight, Nine, Ten, and Eleven.

Toroker was not entitled to an entrapment instruction as to Counts One, Two, Five, Twelve, and Thirteen. Rice was not entitled to an entrapment instruction as to Counts One, Two, Three, Four, Twelve, and Thirteen. Ortiz v. United States, 358 F.2d 107 (9th Cir. 1966); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965).

Since Rice and Toroker were sentenced to serve five years on each of the several counts of which they were convicted, all sentences to run concurrently, the error in the entrapment instruction does not affect a number of counts of which they were convicted and therefore will not be considered on appeal. Chavez v. United States, 387 F.2d 937 (9th Cir. 1967); Jack v. United States, 387 F.2d 471 (9th Cir. 1967); Ayala v. United States, 371 F.2d 515 (9th Cir. 1967); Mathis v. United States, 354 F. 2d 653 (9th Cir. 1965); Stein v. United States, 263 F.2d 579 (9th Cir. 1959).

QUESTION II

Appellants Rice and Toroker urge that they were denied due process of law in that they did not have a proper determination outside of the presence of the jury that their confessions were voluntary.

Under Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964), a defendant who objects to the admission of his confession is entitled

to have the issue of voluntariness determined by a tribunal other than the convicting jury (378 U.S. at 391, 84 S.Ct. 1774, note 19); in this case, by the trial judge. The trial judge's resolution of the issue is "preliminary" in the sense that it precedes the submission of the same issue to the jury, but it is in no sense a partial, limited or tentative determination. On the contrary, it is the primary determination of the issue of voluntariness; it is the determination required by the Constitution. It is the only determination of the issue in jurisdictions following the "orthodox" rule. 378 U.S. at 378, 84 S.Ct. 1774. The trial judge's determination must therefore involve a full resolution of the constitutional issue "including the resolution of disputed facts upon which the voluntariness issue may depend." 378 U.S. at 391, 84 S.Ct. at 1788.

The trial court's obligation is not satisfied by a determination that the government has made out a prima facie case that the confession was voluntary, leaving it to the jury to determine on conflicting evidence whether the confession was freely and voluntarily made; it is "for the trial judge to first decide these conflicts and discrepancies." See also Jackson v. Denno, 378 U.S. at 377-378, 84 S.Ct. 1774; Burns v. Beto, 371 F.2d 598, 603-604 (5th Cir. 1966). Cf. Mullins v. United States, 382 F.2d 258, 261-262 (4th Cir. 1967); Fisher v. United States, 382 F.2d 31, 34 (5th Cir. 1967); Kear v. United States, 369 F.2d 78, 84 (9th Cir. 1966); Butterwood v. United States, 365 F.2d 380 (10th Cir. 1966); United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965).[1]

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[1]Language in pre-Jackson v. Denno opinions (see, e.g., Dyson v. United States, 283 F.2d 636, 639-640 (1960); Leonard v. United States, 278 F.2d 418, 421 (1960); Smith v. United

And it is also settled that although express findings are not required, the fact that the trial court has made such a full and independent determination of the voluntariness of the confession must be ascertainable from the record as a whole. Jackson v. Denno, supra.[2]

Appellants Rice and Toroker objected to the introduction of their confessions on the ground that they were not freely and voluntarily made, principally because they were given while appellants were under the influence of the drug LSD.[3] The trial judge excused the jury and heard the testimony of the government agent who had taken the confessions. The agent testified that both appellants denied they were under the influence of LSD, and that they appeared to be normal and rational. Pursuant to stipulation, the court consid-

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States, 268 F.2d 416, 420 (1959); which might be read as permitting the trial court to submit a confession to the jury without first independently determining the issue of voluntariness on a full evaluation of the evidence, including a resolution of conflicts and questions of credibility, must be treated as superseded by that decision.

[2]After the instant case was tried, the Supreme Court, in Sims v. Georgia, 385 U.S. 538, at page 543, 87 S.Ct. 639, at page 643, 17 L.Ed.2d 593 (1967), applied the rule of Jackson v. Denno, saying:

> A constitutional rule was laid down in that case [Jackson v. Denno] that a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given. * * * *Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.* (Emphasis added.)

The requirements of Jackson v. Denno are applicable to federal courts under the due process clause of the Fifth Amendment. United States v. Feinberg, 383 F.2d 60, 69 (2d Cir. 1967) Cf. Kear v. United States, 369 F.2d 78, 84 (9th Cir. 1966).

[3]Rice and Toroker also testified that the confessions were rendered involuntary by incommunicado in-custody interrogation, threats of imprisonment for "a long time," possibly "180 years," if they did not cooperate, and various promises of lenient treatment if they confessed.

ered as appellants' presentation in support of their claim the contents of the reports of two physicians who had examined appellants. These reports are not in the record, but it appears that they recited a history of heavy and prolonged use of LSD by appellants and statements of opinion by the physicians, based on this history, that appellants were incapable of rational judgment at the time the confessions were taken.

The trial judge overruled appellants' objection to the admission of the confessions. Appellants contend that the court did not make the determination required by Jackson v. Denno.

In our opinion, appellants' contention must be sustained on the record as a whole. It is true that the trial judge indicated on several occasions that the issue before him was the voluntariness of the confessions. But other statements by the judge suggest that he regarded his function to be only that of determining whether the government had made out a prima facie case, leaving it to the jury to resolve the conflicts between the government's evidence and that offered by the appellants. All that the judge said on the subject is set out below, with certain portions emphasized.

The court first stated its view in these words:

> The Court has to be convinced first of all that it is a voluntary confession *or that the evidence is such that the jury may reasonably consider it as a voluntary confession. Then it becomes a question for the jury to determine whether it is actually voluntary*. (Emphasis added.)

On the other hand, in opening the hearing, the court said:

> The record will show that we are proceeding now in the absence of the jury for purposes of determining whether or not the confessions of Mr. Rice and Mr. Toroker are admissible as voluntary.
>
> You may proceed.

And later, referring to the doctors' reports, the court said:

> The Court may, upon reading these reports, make its decision as to the admissibility basically, in the first instance, of the voluntariness of this confession.

But shortly thereafter the court returned to its earlier theme:

> I have not read the doctors' reports but it occurs to me in view of the testimony that it is going to become a factual question the extent to which the defendants have been using and were using LSD at the time. If they were not using it and were not under the influence then there will be no question but what this is admissible or that it is valid.
>
> If the jury believes the evidence, which will be conflicting, that the defendants were under the influences from whatever the evidence then the admission or the confession will be deemed not voluntary and will be disregarded. Our question at this point is, is this a Court question or a jury question. I am of the opinion, without having read all this, that it is a jury question and not a Court question.
>
> There is evidence that the jury may well find that the defendants were normal and acting normal

and were not acting under the influence of any drugs or any stimulant.

The defendants will dispute it. Perhaps the jury ultimately will decide that the defendants are right.

We are talking about the admissibility at this point. It seems to me we have a fairly simple question and that is the evidence as it has been adduced so far as I think is such that the confessions must be admitted with the proper instruction to the jury at the appropriate time as to what the effect of it is and how they are to handle it.

And in announcing its decision, the court said:

THE COURT: There is pending before me a decision as to whether or not the confession should be admitted. The testimony has been completed, has it not?

MRS. DUNNE [Prosecutor]: On the issue of voluntariness.

THE COURT: On the issue of voluntary confession. We have this conflict on it. On the one hand the officers have testified at the time of the arrest and the time these statements were made they appeared to be the same as they are in the courtroom, with embellishments.

The psychiatrists' reports indicate that from information given to them, although they are sane now, or were sane at the time of the examination, the doctors indicate they were insane at the time of the arrest and probably at the time of the commission of the offense.

This is a conflict in the evidence which I think must go to the jury. And it is going to have to be done. We will have to leave this discussion to a

proper framing of the proper instruction at the appropriate time. I don't see any other answer to it.

So the objection to the admission of the confession will be overruled.

* * * * *

THE COURT: There is another thing I might do at this time, and that is to instruct the jury there has been an objection to the admission of these confessions. These confessions, if they are voluntarily, knowingly, and intelligently made are admissible. If they are not knowingly and intelligently made, they are not admissible.

This has become a question which I feel the jury must ultimately decide, and I am admitting them with the thought that there is evidence which must go to the jury. It is up to them to make the decision ultimately in accordance with the instructions which I will later give them as to whether or not these confessions are intelligently and knowingly made.

Finally, after instructing the jury that it must determine whether the confessions were voluntary, the court said:

By overruling the objections which I just overruled I have made no ultimate decision. All I have decided is that there is sufficient evidence both ways to justify it being brought before the jury for determination.

It cannot be said that it is ascertainable from the record as a whole that the trial court discharged its duty to resolve the evidentiary conflicts as to whether the confessions were given under the influence of LSD,

and appellants therefore were not accorded the rights announced in Jackson v. Denno.[4]

The case must, therefore, be remanded to permit the trial court to make an independent determination of the facts and the voluntariness of the confessions either upon the record as it now stands or upon the present record supplemented by additional evidence should the court deem it appropriate to receive such additional evidence.

QUESTION III

The written confessions of both Rice and Toroker identified Javor as the source of the contraband. The trial judge proposed that counsel stipulate before the jury that Rice and Toroker had, at a prior time, admitted committing all of the offenses set forth in the counts of the indictment, under which each was charged. Counsel so stipulated, and no reference was made to the source of the narcotics in the government's case-in-chief.

During the presentation of the defense, Rice and Toroker testified under examination by defense counsel that one "Nick" and not Javor was the source of the contraband and, further, that Javor was present on critical dates at the residence of Rice and Toroker for legitimate business purposes only.

On cross-examination the government was permitted, over objection, to confront both Rice and Torker with certain portions of their written confessions, wherein each had named Javor as the supplier of the narcotics,

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[4]Compare Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968), wherein the trial court, in admitting a confession, stated: "The Court feels that this is a jury question." We remanded for compliance with Jackson v. Denno.

and had stated that Javor's presence at their residence on the critical dates was in connection with this activity. Both Rice and Toroker eventually admitted that they had made these statements in their written confessions. The court carefully and fully instructed the jury that such evidence was received solely for impeachment and only against Rice and Toroker, and that it was not to be considered against Javor for any purpose.

In the opinion originally filed in this appeal, we held that on this record Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), applied retroactively under Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968) (both decided after the appeal in the present case had been submitted), required reversal as to Javor. The government filed a petition for rehearing, urging that we had misread *Bruton*. Whether our original ruling was right or wrong, we are satisfied that it was premature.

If, after determining the facts, the trial court decides that the confessions were involuntary, all three appellants will be entitled to a new trial. Javor was not prejudiced when the admissions of Rice and Toroker were submitted to the jury in the government's case-in-chief because the trial court took steps which effectively precluded any reference to Javor. However, if the confessions were inadmissible, their use to impeach Rice and Toroker was also improper (Groshart v. United States, 392 F.2d 172, (9th Cir. 1968)), and this improper use unquestionably prejudiced Javor.

To decide now whether, assuming the confessions were admissible in evidence, their use for impeachment would be proper or improper in the circumstances of this case, would require the resolution of substan-

tial constitutional issues which it may become unnecessary to decide.

The case is remanded for further proceedings. If the confessions are found to be involuntary, all three appellants shall be given a new trial. Should the confessions be found voluntary, appellant Javor's appeal may be resubmitted on a supplemental record, briefs, and oral argument.